

Regulating political advertising in the UK—truth or consequences?

Suzanne McCarthy considers the regulatory challenges of entering the heat of politics

The recent Brexit referendum resulted in not just a vote for the UK to leave the EU but also ignited a debate about whether political advertising should be regulated. Incendiary statements by the different sides – the £350 million given every week to the EU would be re-directed to the NHS; Turkey was going to be allowed to join the EU within the next few years; and UK families would be £4,300 a year worse off if Britain left the EU – were hurled constantly into the arguments by Leave and Remain campaigners. Both sides vehemently attacked such statements as misleading and inaccurate. Unsurprisingly, petitions calling on the government to ban misleading political advertisements attracted thousands of signatures¹ and groups and political figures have spoken about the need for regulation of political advertising.

The political world and advertising are not strangers as the relationship between Saatchi & Saatchi, the well-known advertising agency, and Margaret Thatcher demonstrated. Her policies may have won her three elections, but it was advertising that got them noticed.²

For the purposes of this article, political advertising is classified as advertisements published in whatever medium whose function is to influence voters in elections or referendums to vote for a particular candidate, party or for a particular position.

Certain questions need to be considered when deciding whether to regulate a specific subject area:

- › Whether regulation is feasible and appropriate given the subject matter;
- › What type of regulation should this be – self-regulation, co-regulation or statutory;
- › Who is going to pay for the regulation, i.e. government or the industry or sector involved;
- › What powers and sanctions the

regulator will have; and

- › How and to whom will the regulator be accountable.

Regulating political advertising in the UK and elsewhere

Advertising in the UK is regulated by an independent self-regulator, the Advertising Standards Authority (ASA). Applying the Advertising Codes (the Codes, which are written by the advertising industry), it considers whether advertisements have breached the Codes by failing to be ‘decent, honest and truthful’, in other words, not misleading, harmful or offensive. The ASA receives no government funding, and the funding it gets from industry comes by way of an arm’s length arrangement to avoid the ASA being compromised. The Electoral Commission, a statutory body, regulates elections and party and election finance (Political Parties, Elections and Referendums Act 2000).

Different rules apply in the UK to broadcast and non-broadcast political advertisements. Broadcast political advertising is banned on TV and radio, and the regulation of party political broadcasts is the responsibility of OFCOM, another statutory regulator. But political parties are given airtime to transmit political broadcasts. Political advertisements in non-broadcast media are not regulated by the ASA being specifically exempted by the Code.³ Notwithstanding this, the ASA received 350 complaints from the public about Brexit campaign advertising. There have been attempts to get political parties to establish a code of practice,⁴ but as no consensus could be reached, this proposal was stillborn.

Other countries also find regulating political advertising problematic. Australia has introduced no legal requirement for the content of political advertising to be factually correct. The Canadian Code of Advertising, like the UK’s, does not control political advertising. While various US state legisla-

tures have attempted to enact truth in political advertising laws, these have been blocked by the Supreme Court’s interpretation of the Constitution’s First Amendment guaranteeing freedom of speech.

Arguments for and against regulation

It is argued that if political advertisements are of questionable truthfulness, they diminish confidence both in the political system and in advertisements generally and for that reason their regulation should be encouraged. Further, as the ASA already deals with advertisements on Government policy, such as the Home Office’s poster encouraging illegal immigrations to make themselves known or risk arrest, and on subjects with political overtones like London airport expansion,⁵ it would be but a small step for it to determine political advertisements. However, commercial advertising is distinctly different both as who gains from it, such as company shareholders, and the advertiser’s objective is not party political power but political influence.

Reasons given against regulation fall into two categories – principle and pragmatism. One argument is that regulation of political advertising might be contrary to the Human Rights Act 1998 being a constraint on freedom of political speech. Further, it is maintained that it would be unacceptable for a body like the ASA to insert itself into the democratic process of an election or a referendum. It is argued that a free press is sufficient to ensure that voters are able to make intelligent decisions. It is also claimed that electors have the power at subsequent elections to punish those who have misled them. That statement is not, however, true for those referendums such as the one on Brexit which are not argued along neat party lines. In those one-off situations, voters do not get a subsequent chance to exercise their franchise.





There are also practical arguments. Once the official starter button is pressed elections and referendums have short time frames. Unless very expensive fast-track processes were used to deal with any complaint, it is unlikely that it would be resolved before voting took place. This would be particularly the case if the advertisement complained about was published just before voting opened. It would be little solace for those voters swayed by that advertisement to find out that they were duped after the event. There is also the issue of sanctions. There is certainly merit in a respected regulator publishing a ruling which is placed on the public record stating that an advertiser has got it wrong, but what about persistent offenders? What would be a sufficient sanction – docking a percentage of the votes; losing one or more MPs? The answer is not straightforward, and nor is the question who should have the authority to impose the sanction. Should the regulator determining the complaint have that authority – which would place it firmly in the political arena – or should this be passed to another body? Passing it onto politicians would undoubtedly bring the possibility of serious and dangerous conflicts of interest.

More importantly and fundamentally, any complaint investigation would require the cooperation of the political parties. The evidence of previous failed attempts to get them to agree to a code, makes this seem very unlikely especially during the heat of a political campaign. Further, it has to be expected that at least some of the investigatory costs would be sought from Government, and as such opens up questions of unwanted intervention especially if the regulator was an independent, self-regulator like the ASA.

Conclusion

Political advertising can be truthful, but ensuring it is truthful is not straightforward. Regulating political

advertising takes its regulator into the heart and heat of the political game. While intellectually there may be a case for regulating political advertising, the practical problems of doing so make it unlikely that such regulation will be introduced in the UK any time soon.

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- 1 One petition, which attracted over 78,000 signatures, read, 'The general population of the UK are tired of listening to outright lies and misrepresentation from the political elite in order to gain votes. With a more honest representation of facts our democracy would hand power back to the people it governs.' The Government responded by referring to the seven principles of public life which apply to those who hold public office including people who are elected or appointed to public office, nationally and locally. Another called for the creation of an independent regulatory body 'to ensure truth in political advertising'.
- 2 One of the most famous Saatchi & Saatchi political posters (1979) showed a dole queue snaking out from an employment office and disappearing into the distance. The title read, 'Labour isn't working', and underneath, in smaller type, 'Britain's better off with the Tories'.
- 3 Rule 7.1. This was not, however, always the case. Until 1999 non-broadcast political advertising was subject to the Code to some extent such as on the basis of offensiveness. The Conservative Party's 1996 campaign showing Tony Blair with 'demon eyes' was determined by the ASA to have caused offence and in breach of the Code.
- 4 Neill Committee on Standards in Public Life, October 1998, recommendation 96. In 2003 the Electoral Commission conducted a consultation on the regulation of electoral advertising, but concluded that the ASA should not be responsible for such advertising and did not itself establish a code. The Committee also observed that political parties spent large sums of money on advertising and this led to the Committee's proposals to limit election expenditure by parties (recommendations 94 to 97), which is something also used by other countries as an indirect way of controlling political advertising.
- 5 ASA ruling, Home Office, dated 9 October 2013; ASA ruling Back Heathrow t/a Back Heathrow 20 April 2016; ASA ruling Heathrow 4 February 2015; ASA ruling Gatwick Airport Ltd t/a Gatwick Airport 12 August 2015; ASA ruling Gatwick Airport Ltd 26 August 2015; ASA ruling Gatwick Airport 4 March 2015